to recent successful climate change litigation efforts. The decision is replete with innovative and noteworthy contributions to current debates in both comparative constitutional and public international law.

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State immunity—State Immunity Act 1978 (UK)—service on a state in civil proceedings—identification of customary international law—United Nations Convention on Jurisdictional Immunities of States and Their Property

GENERAL DYNAMICS UNITED KINGDOM LTD. V. STATE OF LIBYA [2021] UKSC 22, [2021] 3 WLR 231. *At* https://www.supremecourt.uk/cases.
Supreme Court of the United Kingdom, June 25, 2021.

The decision of the Supreme Court of the United Kingdom in *General Dynamics United Kingdom Ltd. v. State of Libya*[1] (*General Dynamics*) concerned the interaction between the Civil Procedure Rules 1998 (Procedure Rules)[2] and the State Immunity Act 1978 (Immunity Act),[3] in light of the international law of state immunity. The question for the Supreme Court was which took priority. The answer—by a three to two margin—was the Immunity Act. Of particular interest from the perspective of public international law is: first, the majority's recourse to the animating principles of state immunity to ground its reasoning; and second, the rejection by both the majority and minority of Libya's argument that a provision of the Immunity Act reflected a rule of customary international law.

Section 12(1) of the Immunity Act provides:

> Any writ or other document required to be served for instituting proceedings against a state shall be served by being transmitted through the Foreign, Commonwealth and Development Office to the Ministry of Foreign Affairs of the State and service shall be deemed to have been effected when the writ or document is received at the Ministry.

This process has the capacity to conflict with Procedural Rule 62.18. That Rule provides, with respect to an action for enforcement of an arbitral award as an English judgment under Section 101 of the Arbitration Act 1996 (Arbitration Act),[4] that an award creditor need only serve the award debtor with the court's order enforcing the award—not the originating process. In seeking to enforce an arbitral award against Libya, General Dynamics contended that an award creditor to enforce against a state under Section 101 was not required to comply with Immunity Act Section 12(1) and could avoid the need for service on a foreign state via the Foreign, Commonwealth and Development Office (Foreign Office)—a cumbersome procedure that can take months.

[1] General Dynamics United Kingdom Ltd. v. State of Libya [2021] 3 WLR 231 (June 25, 2021) (UK).
[2] Civil Procedure Rules 1998, SI 1998/3132 (L 17) (as amended) (UK).
[3] State Immunity Act 1978, ch. 33 (UK).
[4] Arbitration Act 1996, ch. 23 (UK).

The facts of the case were as follows. In 2013, General Dynamics commenced an arbitration against Libya before an arbitral tribunal under the auspices of the International Chamber of Commerce (ICC), claiming moneys owed under a contract for the supply of weapons communications systems to the Qaddafi regime. In 2016, the ICC tribunal found in favor of General Dynamics, issuing an award of £16,144,120.62 plus interest and costs against Libya. Libya did not pay. In 2018, General Dynamics launched proceedings in the Commercial Court in London to enforce the award under Section 101 of the Arbitration Act. Mr. Justice Teare heard General Dynamics *ex parte* and granted it permission to enforce the award as a judgment of the English courts. He further ordered—per Procedural Rule 6.16—that General Dynamics not be required to serve the originating process on Libya via the Foreign Office because: (1) Libya had participated in the underlying arbitration and so was aware of the award; and (2) two entities claimed to be the government of Libya at that time and the country was in a state of civil strife, giving rise to exceptional circumstances.[5] The Court allowed General Dynamics to effect alternative service on Libya by courier to addresses in Paris and Tripoli.[6]

Libya objected to Mr. Justice Teare's removal of its procedural privileges. It applied to the Commercial Court to set aside the judge's order on service and require General Dynamics to comply with Immunity Act Section 12(1). Lord Justice Males granted the application, holding that: (1) compliance with Section 12(1) was essential in all cases where an English court was called to exercise jurisdiction over a foreign state; (2) for proceedings under Section 101, the term "writ or other document required to be served for instituting proceeding against a state" extended to the enforcement order served on Libya under Procedural Rule 62.18; and (3) in either case, General Dynamics was required to comply with Section 12(1).[7]

General Dynamics then appealed to the Court of Appeal, which overturned Lord Justice Males's judgment, holding that Section 12(1) was not mandatory and that an English court had the capacity in an appropriate case to dispense with service on a foreign state under Procedural Rule 6.16.[8]

The Supreme Court allowed Libya's appeal from that judgment. Lord Lloyd-Jones (with whom Lord Burrows agreed) gave the majority judgment (paras. 1–87). Lady Arden issued a short concurring judgment (paras. 88–100). Lord Stephens and Lord Briggs dissented vigorously (paras. 101–244).

Writing for the majority, Lord Lloyd-Jones held that Immunity Act Section 12(1) was *ex facie* mandatory and could not be circumvented in any proceedings falling within its terms (para. 37). [9] He held that Procedural Rule 62.18 fell within those terms for two reasons. First, he noted that enforcement of the award under Arbitration Act Section 101 could not occur until the enforcement order was served on Libya. As such, the enforcement order was just as

[5] Later cases clarified that the UK had recognized the Libyan Government of National Accord since April 2017. *See, e.g.*, Mohamed v. Breish & Ors. [2020] EWCA Civ. 637, paras. 31, 35–39 (May 15, 2020) (UK).

[6] General Dynamics United Kingdom Ltd. v. State of Libya [2018] EWHC 1912 (Comm), paras. 2–3 (July 20, 2018) (UK).

[7] General Dynamics United Kingdom Ltd. v. State of Libya [2019] 1 WLR 2913, paras. 36, 78 (Jan. 18, 2019) (UK).

[8] General Dynamics United Kingdom Ltd. v. State of Libya [2019] 1 WLR 6137, para. 60 (July 3, 2019) (UK).

[9] Subject to the conclusion of a separate agreement between the claimant and the state. Immunity Act, *supra* note 3, Sec. 12(6).

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much part of the procedure for "instituting proceedings" in this context as the originating process and was therefore a document "required to be served" under Section 12(1) of the Immunity Act. General Dynamics' failure to serve it through the Foreign Office thus constituted improper service (para. 41).

Second, Lord Lloyd-Jones noted that the principles underpinning the Immunity Act compelled the same conclusion. The exercise of jurisdiction by the courts of one state over another state is an act of sovereignty that requires, for reasons of comity, the defendant state to be given proper notice and adequate opportunity to respond. This, in turn, compelled reading Section 12(1) broadly to apply to all documents bringing proceedings to the attention of a defendant state (paras. 43, 58–62, 72–75).

Furthermore, Lord Lloyd-Jones held, the mandatory wording of Section 12(1) meant that service on a defendant state via the Foreign Office could not be dispensed with by the court under Procedural Rule 6.16. Nor could an order for alternative service be made (paras. 77–81). He also dismissed General Dynamics' argument that Section 12(1) should be read narrowly via Section 3 of the Human Rights Act 1998[10] on the basis that it was inconsistent with Article 6 of the European Convention on Human Rights, which guarantees a right of access to court.[11] Requiring service on a foreign state via the diplomatic channel was hardly unique to the Immunity Act and Section 12(1) was pursuing a legitimate objective by proportionate means, consistent with Article 6 (para. 84).

Lord Lloyd-Jones also addressed Libya's argument that even if Immunity Act Section 12(1) did not apply to proceedings under Arbitration Act Section 101, there was nevertheless a rule of customary international law (incorporated, in turn, into English law[12]) that whenever a state is impleaded before the courts of another state, service of documents instituting the proceedings must be effected via the diplomatic channel (para. 49). That submission was founded on another service provision: Article 22 of the United Nations Convention on Jurisdictional Immunities of States and Their Property (UN Convention).[13] But Lord Lloyd-Jones held that the mere existence of Article 22—which was not in force—was insufficient to prove that it reflected customary international law.[14] Rather, he noted by reference to the jurisprudence of the International Court of Justice (ICJ)[15] that Libya was required to show that Article 22 reflected "both widespread, representative and consistent state practice, and an acceptance by states that the practice is followed as a matter of international obligation (*opinio juris*)" (para. 51). Lord Lloyd-Jones dismissed the suggestion that Article 22 met this threshold, pointing out that the preparatory work in the International Law Commission

[10] Human Rights Act 1998, ch. 42 (UK).

[11] Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 11, 1950, 213 UNTS 221 (*entered into force* Sept. 3, 1953).

[12] Via the common law doctrine of incorporation. *See, e.g.*, Trendtex Trading Corp. v. Central Bank of Nigeria [1977] QB 529, 554C–H (Lord Denning MR) (Jan. 13, 1977) (UK).

[13] United Nations Convention on Jurisdictional Immunities of States and Their Property, *opened for signature* Dec. 2, 2004, *annexed to* UNGA Res 59/58 (Dec. 2, 2004) (*not yet in force*).

[14] It is unclear how far this argument would have gotten Libya if its position on Immunity Act Section 12(1) was not accepted. Like Section 12(1), UN Convention Article 22(1) speaks of "[s]ervice of process by writ or other document instituting a proceeding against a State," such that General Dynamics' submissions on Procedural Rule 62.18 could be made to apply to it *mutatis mutandis*.

[15] North Sea Continental Shelf (Ger. v. Den.; Ger. v. Neth.), Judgment, 1969 ICJ Rep. 3, para. 77 (Feb. 20); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 ICJ Rep. 14, para. 207 (June 27).

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(ILC) showed that the provision was a compromise position and not intended to codify customary international law (paras. 52–53).[16]

Lord Stephens's dissent focused on English principles of statutory construction (paras. 131–38). Given that Immunity Act Section 12(1) did not reflect a rule of customary international law, he said, there was no need to interpret the provision broadly (paras. 139–66). Moreover, at the time at which the Immunity Act was adopted, there were procedures in English law that could be initiated without serving originating process, such that "Parliament must be taken to have known that by introducing the criterion of a document which was 'required to be served' into section 12(1) . . ." (para. 171). It followed that where new causes of action were introduced by Parliament that did not require service of originating process—such as Arbitration Act Section 101—Parliament did not intend Section 12(1) to apply to those proceedings (paras. 180, 198–200). Furthermore, given that the provision had to be interpreted dynamically in light of procedural changes in English law, it also needed to take account of the subsequent introduction of the mechanism (now contained in Procedural Rule 6.16) permitting the court to dispense with service in exceptional circumstances (paras. 232–39). Alternatively, he held that European Convention Article 6 required that such directions be capable of being made to ensure access to the court, necessitating dilution of Section 12(1) (paras. 240–43).

Notably, Lord Stephens relied on the restrictive doctrine of state immunity. If, he said, the restrictive doctrine was a response to states' incursion into commercial life, then it was incumbent on states to comply with the rules of the "marketplace"—meaning not only that states were subject to the jurisdiction of the other states' courts with respect to commercial transactions, but that they should also expect persons doing business with them to be provided with access to those courts. Immunity Act Section 12(1) was to be read in that light (paras. 139–40, 143, 145–46, 166).

* * * *

From a public international and foreign relations law perspective, there is much to like in the *General Dynamics* case. To start with the common ground between the majority and the minority, both judgments demonstrate facility with the tricky process of identifying customary international law. Two points are noteworthy.

First, the Supreme Court may now be taken to have retired various English *dicta*[17]—and registered its disapproval of similar statements by international courts[18]—that the provisions of the UN Convention may reflexively be taken as reflecting custom. That position has been unsustainable since at least the ICJ's decision in *Jurisdictional Immunities of the State* (wherein it explained persuasively that the UN Convention was not *ipso facto* reflective of custom, but that its provisions could shed light on its content[19]) but its debunking has gained momentum

[16] *See further* Tarcisio Gazzini, *Article 16*, *in* THE UNITED NATIONS CONVENTION ON JURISDICTIONAL IMMUNITY OF STATES AND THEIR PROPERTY: A COMMENTARY 349–50 (Roger O'Keefe & Christian J. Tams eds., 2013).

[17] *See, e.g.*, AIG Capital Partners Inc & Anor v. Republic of Kazakhstan (National Bank of Kazakhstan intervening) [2006] 1 WLR 1420, para. 80 (Oct. 20, 2005) (UK); Jones v. Ministry of the Kingdom of Saudi Arabia (Secretary of State for Constitutional Affairs intervening) [2007] 1 AC 270, paras. 26 (Lord Bingham), 47 (Lord Hoffmann) (June 14, 2006) (UK).

[18] Wallishauser v. Austria, Judgment, ECtHR App. No. 156/04, para. 69 (July 17, 2012).

[19] Jurisdictional Immunities of the State (Ger. v. It.; Greece intervening), 2012 ICJ Rep. 99, paras. 54–55 (Feb. 3).

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by the increasing citation of the UN Convention in English proceedings, resulting in scrutiny of its terms.[20] *General Dynamics* is the capstone to this process, and places litigants on notice that mere invocation of the UN Convention as custom will be met with skepticism by English courts.

Secondly, both the majority and minority plainly understood just how hard it is to prove a rule of customary international law. They demonstrated this in different ways. Lord Lloyd-Jones did so by placing the burden of proof on Libya and holding that UN Convention Article 22 was on its own insufficient to establish a rule of custom, especially in light of the provision's genesis in the ILC (paras. 51–54). The fact that the European Court of Human Rights reached the contrary conclusion in *Wallishauser v. Austria*[21] did not move him, and he saw no reason to defer to that court on the determination of customary international law (paras. 55–56). Lord Stephens adopted a similar approach, pointing to the absence of provisions equivalent to Immunity Act Section 12(1) in a range of common and civil law jurisdictions (paras. 149–58). Both the majority and minority approaches are consistent with public international law—it being "axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of states," not in treaties not yet in force.[22]

The differences between the majority and minority in *General Dynamics* perhaps boil down to different conceptions of comity and its importance. For the majority, comity was the motivating force behind Section 12(1), reflecting the sensitivities surrounding an assertion of jurisdiction by English courts over a foreign state. In light of the importance of state immunity within public international law,[23] the majority considered that comity required foreign states be given notice of English proceedings against them by a predictable method—namely service through the Foreign Office (paras. 59–62). For the minority, comity was, at most, a "courtesy" extended by one state to another, and "clearly overridden by the restrictive doctrine of state immunity and the aspect of comity that requires states who enter into the marketplace to abide by the rules of the marketplace" (para. 166).

One can understand why the minority reached the conclusion it did. Section 12(1) grants foreign states an automatic procedural advantage before the English courts; one that might appear unfair where the state is the award debtor following an arbitral process to which it consented and in which it participated. That said, the majority's approach to this issue is to be preferred, for two reasons. The first relates to the minority's reliance on the "marketplace" as an organizing concept for state immunity and Section 12(1). It derived this from Lord Denning's statement in *Trendtex Trading Corporation v. Central Bank of Nigeria* that "[i]f a government department goes into the market places of the world and buys boots or cement – as a commercial transaction – that government department *should be subject to all the rules of the market place*" (paras. 142–46).[24] But Lord Denning was there discussing

[20] *See, e.g.*, Benkharbouche v. Embassy of the Republic of Sudan (Secretary of State for Foreign and Commonwealth Affairs intervening) [2019] AC 777, para. 32 (Oct. 18, 2017) (UK); Ukraine v. PAO Tatneft [2019] EWCA Civ. 763, paras. 13–14 (Apr. 16, 2019) (UK). *But cf.* Argentum Exploration Ltd. v. The Silver & Ors [2021] 2 WLR 613, para. 151 (Dec. 16, 2020) (UK).

[21] *Wallishauser*, *supra* note 18, para. 69.

[22] Continental Shelf (Libya/Malta), Judgment, 1985 ICJ Rep 13, para. 27 (June 3).

[23] *Jurisdictional Immunities of the State*, *supra* note 19, para. 57.

[24] *Trendtex*, *supra* note 12, at 558E (emphasis added).

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a state's liability to suit by a commercial counterparty in the English courts, *not* the modalities by which the state should be served with that suit. On that question, he took no position. The same can be said of the other cases cited by the minority.[25] Application of the concept of the "marketplace" with respect to service does not therefore follow cleanly from the authorities on which the minority relied.

The second (and related) reason derives from the fact that the Immunity Act is concerned with more than subjecting foreign states to the rules of the marketplace. The immunity of foreign states set out in Section 1(1) is subject to exceptions that do not require the foreign state to be operating commercially. Section 2 applies whenever a foreign state submits to the jurisdiction of the English courts, irrespective of whether the relevant proceedings concern a commercial transaction.[26] Section 5 applies to proceedings relating to personal injury, death or property damage caused by a foreign state within the UK, even where the state was not behaving as a commercial actor. And Section 9(1)—the relevant exception in *General Dynamics* (paras. 182–83)—applies whenever a foreign state consents to arbitration, even where that arbitration concerns the state's conduct *qua* sovereign (e.g., an investment treaty arbitration[27]). Section 12(1) applies with equal force in these situations as it does in relation to Section 3(1) concerning commercial transactions or Section 10 concerning commercial shipping. To say that Section 12(1) is subsumed within and subject to the rules of the marketplace is therefore inaccurate—it must apply (and frequently is applied) in proceedings concerning a foreign state's activity *jure imperii*. In such situations, considerations of comity—as defined by the majority—become essential as a matter of diplomatic relations.

Put bluntly, the Immunity Act treats foreign states as special because they are. They are sovereign, bureaucratic entities that require additional time to prepare for litigation. At the heart of Section 12(1)—as interpreted by the majority—is the policy choice that the state's need for such leeway is more important than the claimant's right to commence proceedings immediately. *General Dynamics* does not say that the claimant may *never* commence litigation against the state owing to Section 12(1)—that is the province of Section 1(1). All it is saying is that Section 12(1) requires the claimant to wait a little longer; or, alternatively, secure from the state an agreement for alternative service under Section 12(6), the importance of which has increased in the wake of this decision.

In sum, the majority and minority positions in *General Dynamics* reflect a UK Supreme Court well equipped to address difficult questions of public international and foreign relations law. The question presented in this case required the Court to grapple with matters of deep principle at the interface of the municipal and international planes. The perspectives of the majority and minority reflect the tension between these two fields of law, which is increasingly seen, *inter alia*, in the domestic enforcement of investment treaty awards. On the one hand, the majority maintained the approach, characteristic of public international law, of treating states as special; the minority, conversely, was more driven by the desire

[25] Thai-Europe Tapioca Service Ltd. v. Government of Pakistan & Ors. [1975] 1 WLR 1485, 1491E (Lord Denning) (July 15, 1975) (UK); The Philippine Admiral [1977] AC 373, 402D–E (Lord Cross) (Nov. 5, 1975) (UK); I Congreso del Partido [1983] 1 AC 244 at 262D (Lord Wilberforce) (July 16, 1981) (UK).

[26] *See also* Immunity Act, *supra* note 3, Sec. 13(3), providing that a state may waive its immunity from enforcement with respect to particular property, even where that property is used for sovereign purposes.

[27] *See, e.g.*, Gold Reserve Inc. v. Bolivarian Republic of Venezuela [2016] 1 WLR 2829 (Feb. 2, 2016) (UK); PAO Tatneft v. Ukraine [2018] 1 WLR 5947 (July 13, 2018) (UK).

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for speedy recognition and enforcement of arbitral awards which characterizes the English approach to such matters generally. Whichever view one prefers, the quality of analysis in both judgments is encouraging to those who would entrust such matters to the English courts.

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